IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 763

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

STANDARD OIL COMPANY OF LOUISIANA,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF ON BEHALF OF APPELLANTS.

May It Please Your Honors:

There are a number of questions made on the record in this case, but the two vitally important to the people of Tennessee for decision by this Honorable Court are:

(1) Whether a state is without power so to regulate the price of gasoline sold by local dealers to her citizens as to allow such dealers to exact only reasonable prices therefor; and

(2) Whether a state is without power to require a foreign corporation, as a condition of its doing business within the state, to furnish information in respect of the conduct of its business and the sale price of its gasoline for the purpose of ascertaining a reasonable price for such gasoline, *and also as tending to disclose whether such dealer is guilty of rebates and discriminations denounced as unlawful and injurious by the state.*

These questions were decided against the State of Tennessee by the Honorable District Court, and, through her proper officials, she has appealed to this Honorable Court for relief.

HISTORY OF THIS CASE.

Prior to 1925, the Standard Oil Company of Louisiana, appellee herein, had been doing business in Tennessee, including the purchase by the public of its gasoline, until it was selling wholesale and retail to the people of Tennessee approximately fifty per cent (50%), or more, of the gasoline used by them.

Other gasoline companies, some independent and some confederated with or allied to appellee, had come to do business in Tennessee.

There was instituted in the latter part of 1925 a "price war" by appellee and the larger companies designed and tending to crush competition by the smaller companies.

This "price war" was carried on by the means and methods usually invoked by appellee to drive out and destroy competition—that is, by rebates, discriminations in prices, the lowering of prices in some localities, resulting in the destruction of competition therein, and raising prices in other localities to offset and recoup the difference in the prices where competition had been destroyed (R., pp. 48, 49, 50), until the people of Tennessee were practically at the mercy of the appellee and those confederated with it.

To have ousted or sought to oust appellee from the state for the violation of the anti-trust law would not have resulted in relief, because, as will be hereinafter referred to, the ousted company would have been immediately succeeded

by another company different in name, but owned by the same interests. All of this was well known to the Governor of Tennessee, who appealed to the appellee and the other larger companies in the interest of the people of Tennessee for a cessation of the practices indulged in to carry on the "price war" and for a reduction in the price of gasoline, which had increased tremendously as the result of the destruction of competition and the means used to accomplish such result.

Some of the larger dealers, finally including the appellee, lowered their prices (R., p. 51), but did not discontinue their practice of price cutting, rebates and concessions to favored customers; whereupon when the General Assembly of Tennessee convened in 1927, *the Governor submitted a message to said General Assembly*, as follows:

> "I recommend proper legislation to control the distribution and price of gasoline. Bills are being carefully prepared to this end. Our people have been victimized long enough in the excessive cost of gasoline. The state regulates the cost and distribution of gas and electricity. It is far more important to regulate the cost and distribution of gasoline. This commodity, to all effects and purposes, is now controlled by a monopoly. There are numerous refineries and many distributors, but a single company in reality makes the market on gasoline. Sometimes there is competition in prices, but that is occasional. We may have a short period of price competition, always succeeded by higher prices. Some state must become a pioneer in this field of regulation. Let Tennessee take the lead; she is the Volunteer State. I recommend that a proper agency be forthwith created, with power and authority to approve or refuse all changes in the price of gasoline and to regulate its cost and distribution, and to make all necessary rules and orders in connection therewith for the protection of the public, and for the protection of all distributors of gasoline, against the machinations and unfair practices of more powerful competitors. Eminent lawyers maintain that the state can exercise these powers; if so, they certainly need to be exercised.

"The people should not be required to submit to the extortion which prevails in Tennessee during recent months. Our people are being plundered without let or hindrance, yet the state was powerless to compel relief. We could only importune it. The Governor suffered under the shame and humiliation of our situation. No company doing business in Tennessee has any right to spurn the just demands of the people. Our present situation is intolerable, and you should attack this problem from every angle and pass bills of any kind on the subject of gasoline control which are lawful and just. Eminent counsel have been employed to prepare this legislation, and while I am the Governor, I intend to contest whatever laws that are passed to the last courts of the country until we have established the power of the state over all companies, big and little, which sell and distribute gasoline in Tennessee, in the interest of reasonable prices and fair competition."

LEGISLATION COMPLAINED OF.

The result of the conditions brought about by appellee herein and its allies was—all known to the people of Tennessee and their representatives—Chapter 22 of the Acts of the General Assembly of Tennessee of 1927, duly passed and approved by the Governor on April 8, 1927, by which the State of Tennessee sought to regulate the sale price of gasoline within her borders by providing agencies for the fixing of reasonable charges and prices therefor, by prohibiting rebates and other discriminations in respect of such charges, and by requiring dealers in gasoline to furnish certain information, in regard to their business, considered necessary or helpful in the fixing of reasonable prices or in discovering and preventing unlawful rebates, combinations, or discriminations in business, enabling such dealers to extort from purchasers unfair, unreasonable, and unequal prices for said commodity devoted to and impressed with a public use.

R., pp. 16-23.

Said Act is found in the Record on pages 16 to 23, inclusive, and for convenience is printed as an appendix to this brief.

The preamble of said Act, as set forth in its first section, is as follows:

> "Whereas, gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this state; and
>
> "Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the state to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation:
>
> "It is therefore hereby declared that the sale and marketing of gasoline in this state is impressed with public use."

BILL FILED.

On April 9, 1927, the day following the passage of said Act, and before any of its provisions could have been enforced, the appellee, Standard Oil Company of Louisiana, a corporation organized under the laws of Louisiana, as plaintiff, filed its bill in the District Court of the United States for the Middle District of Tennessee, alleging, in substance, among other things, that said Act was void for the alleged reason that it interferes with appellee's freedom to contract, and that, in attempting to fix or control the prices for the sale of appellee's gasoline, offends against the due process clause of the Fourteenth Amendment to the Federal Constitution.

R., pp. 2-15.

The Act is also challenged upon the grounds that it confers legislative authority upon the courts and interferes

with interstate commerce; but inasmuch as the Honorable District Court did not pass upon these questions—certainly did not sustain the appellee's insistence thereon—it is not deemed necessary to further refer thereto.

It is to be noted that there was no charge in the bill to the effect that it was the intention of the state, through the agencies named in the bill, to require appellee to sell its gasoline at an unreasonable price or at a price that would not yield a fair and just return to appellee.

An injunction was prayed (R., pp. 14, 15), inhibiting appellants, officers of the state by and through whom the provisions of said Act is to be administered, from enforcing the terms and provisions thereof.

On the same day—to-wit, April 9, 1927—a restraining order was issued.

R., pp. 23, 24.

ANSWER AND MOTION TO DISMISS BILL.

On April 30, 1927, the appellants, defendants to the original bill, filed their answer (R., pp. 25-54), and incorporated therein (R., pp. 25, 27) a motion to dismiss the bill upon, in substance, the following grounds:

(1) The allegations of the bill showed no grounds for equitable relief.

(2) That to the extent said bill is predicated upon claimed interference with plaintiff's alleged contract rights, plaintiffs wholly failed to aver and set out any contract existing between it and any firm, person, or corporation which would be unlawfully affected by said Act within the meaning of the provisions of the State or Federal Constitutions relied upon in said bill.

(3) That plaintiff is a foreign corporation and is entitled to carry on its intra-state business in Tennessee only under such conditions as said state may deem proper to impose upon it, and said Act passed within the just powers of said state is a valid enactment, prescribing the terms and conditions upon which plaintiff may carry on and operate its intra-state business; and if plaintiff does not desire to comply with said Act, it may withdraw or discontinue such business without incurring any penalty whatsoever.

(4) That said Act is a valid enactment within the sovereign and police powers of said State of Tennessee.

(5) That upon the facts averred in the bill, and other facts of general and common knowledge, of which the court will take notice, gasoline, by the acts and doings of plaintiff, has been devoted to a public use and is affected with a public interest, and is therefore subject to regulation by the State of Tennessee.

(6) That it is within the power of the state to prohibit concessions, rebates, gratuities, and other practices, the necessary result of which is to destroy fair and reasonable competition and bring about unjust discrimination between purchasers and users of gasoline.

(7) That the officers of the state, charged with the enforcement of said Act, have taken no action with the view of determining the regulations or fixing the prices of gasoline, and until such action shall be taken and shown to be unreasonable in the sense of the law, there is no ground of equity jurisdiction; and further that the bill shows that plaintiff has not sought to avail itself of the remedies provided by the bill, fully adequate to protect every right of plaintiff.

(8) That no case is made by the bill showing any violation of the property rights of plaintiff.

(9) The Court must assume that the conditions of marketing and selling of gasoline in Tennessee at the time said Act was passed were and are as denounced in said Act, and before the Court can entertain jurisdiction of this cause the plaintiff must allege in the statement of its grievances facts that it was not engaged in the practices having the effect condemned in said Act, and particularly the first section thereof, which was not done.

ANSWER.

In their answer (R., pp. 27-32), appellants denied the allegation of appellee to the effect that it has been legally qualified, or has been entitled since May, 1910, to do business in Tennessee, and specially pleads that appellee is not so qualified or entitled to do business in said state, but, in fact, is an outlaw and has been enjoined from carrying on or do-

ing business in the State of Tennessee by the judgments of the courts of said state, affirmed by this Court.

The facts averred to sustain said special plea and insistence are in brief as follows:

That during and prior to 1906, the Standard Oil Company of Kentucky—one of the group of Standard Oil corporations—had been doing business in Tennessee, and, along with certain of its representatives and agents, was indicted in 1905 for violating the Tennessee "anti-trust law" in that it had entered into a conspiracy for lessening and destroying free competition in the sale of coal oil in Tennessee, with the result that said corporation and its representatives—co-conspirators—were convicted and fined five thousand dollars ($5,000.00), and one of its representatives was fined $3,000.00; but upon appeal, while the judgment against said representatives was affirmed, it was held by the Supreme Court of Tennessee that the remedy against the offending corporation was not by fine, but by a proceeding to oust it from doing business in the state, with the result that the judgment imposing the fine was reversed. This case is officially reported under the name and style of *Standard Oil Company, et al., vs. The State,* 117 Tennessee, pp. 618 to 679, inclusive.

Thereupon, the State of Tennessee, on the relation of her Attorney General, filed a bill in one of the chancery courts of said state, charging, in substance, that the Standard Oil Company of Kentucky had been guilty of conspiracies and agreements violative of the Tennessee anti-trust law, and seeking a decree cancelling its permit to do business in the state, and that it be ousted and enjoined from further carrying on its intra-state business in Tennessee.

To said bill said corporation made defense, but upon the proof adduced at the trial the Chancery Court granted the relief sought and perpetually enjoined said Standard Oil Company of Kentucky from doing business in Tennessee.

R., pp. 28, 29.

Upon appeal by said corporation from the Chancellor's decree, it was affirmed by the Supreme Court of Tennessee on April 11, 1908, and the opinion of the Court directing

the affirmance of the decree is reported in 120 Tenn., pp. 86 to 178, inclusive.

R., pp. 29, 30, 56, 57.

Said Standard Oil Company sought and secured a writ of error from this Court to the Supreme Court of Tennessee for the purpose of reviewing the decree of the latter Court, and in due course the case came for trial in this Court on or about April 20, 1910; and on May 2, 1910, this Court affirmed the decree of the Supreme Court of Tennessee and that of the Chancellor, hereinbefore referred to.

The opinion of this Court, officially reported, is to be found in 217 U. S., pp. 817, *et seq.*

R., pp. 30, 56-60.

After the Supreme Court of Tennessee had affirmed the decree of the Chancellor, ousting said Standard Oil Company of Kentucky from doing business in Tennessee and enjoining it from doing further intra-state business in said state, and after said Oil Company had secured a writ of error from this Court to said Supreme Court of Tennessee, as hereinbefore shown, appellee herein, plaintiff in the District Court, was granted a charter from the State of Louisiana; but it made no application to the authorities for permission to do business in the State of Tennessee until *May 6*, 1910—*only four days* after this Court had, on May 2, 1910, affirmed the ouster decree against the Standard Oil Company of Kentucky.

R., p. 31.

That both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana were and are but dummy corporations, owned, controlled, and dominated by the Standard Oil Company of New Jersey, which latter corporation practically dominates and controls the entire gasoline industry in the United States.

R., pp. 31, 48.

That after the affirmance by this Court of the ouster decree of the Supreme Court of Tennessee, the Standard Oil Company of New Jersey, theretofore doing business in Tennessee through its dummy corporation, Standard Oil Com-

pany of Kentucky, continued to do business in said state by the simple subterfuge of filing with the Secretary of State of Tennessee a copy of the charter of the Standard Oil Company of Louisiana and changing the name in Tennessee from Standard Oil Company of Kentucky to Standard Oil Company of Louisiana.

That there was no change in the management of the business, which was not only dominated and controlled by the same owner—to-wit, Standard Oil Company of New Jersey—but retained the same management in Tennessee, same officials, same employees, using the same property and paraphernalia of trade—except upon the tank wagons, stations, and stationery the name "Kentucky" was stricken out and the name "Louisiana" substituted—so that the corporate or business name appeared to the public as Standard Oil Company of Louisiana.

That the officials of the State of Tennessee did not know at the time the copy of the charter of the Standard Oil Company of Louisiana was filed that it was but a dummy corporation, owned and controlled by the Standard Oil Company of New Jersey, which was also the owner of the Standard Oil Company of Kentucky, which had been ousted from the state, and did not know that the same "managers, agents, servants, and attorneys" of the Standard Oil Company of Kentucky, who had been enjoined from doing business in Tennessee, were continuing to do and carry on the same business under the fraudulent name and guise of the Standard Oil Company of Louisiana, and that the facts in reference to said fraud and subterfuge were but recently discovered.

R., pp. 31, 32.

Therefore it was averred and charged that said Standard Oil Company of Louisiana, being but a dummy corporation of the Standard Oil Company of New Jersey and the reflection of its dummy Standard Oil Company of Kentucky, was fraudulently substituted by the common owner, Standard Oil Company of New Jersey, into the oil business in Tennessee, from which the said Kentucky corporation had been ousted, and that said Standard Oil Company of Louisiana

had never legally and properly complied with the laws of Tennessee, and that it came fraudulently into the State of Tennessee, and is now in contempt of the decree and injunction of the Supreme Court of Tennessee and the Chancery Court of Sumner County.

R., pp. 31, 32.

For the reasons aforesaid appellants denied that the Standard Oil Company of Louisiana is entitled to invoke the jurisdiction of a court of equity upon the grounds set forth in its bill.

FURTHER ANSWER.

In and by said answer special denials are interposed to several paragraphs of plaintiff's bill, and it is insisted that plaintiff and its associates have a virtual monopoly of the gasoline industry in Tennessee; that the sale of gasoline by said companies, amounting to more than 129,000,000 gallons, has been superinduced and brought about by said companies, who have, in fact, devoted gasoline to the public use; and that under the police powers of the state it has the right to regulate the method of dealing and the rates and charges, so as to insure to the purchasers of gasoline a fair price and to the dealer a fair profit; and that it has the right to require the Standard Oil Company of Louisiana to furnish the information referred to in Sections 3 and 4 of said Act (pp. 17, 18), not only to enable the officials of the state, charged with the duty of administering said Act, to ascertain what would be a fair and reasonable price for gasoline, but to enable them to carry into effect and administer the provisions of Section 8 of said Act (R., p. 21), prohibiting gasoline dealers in Tennessee from granting any rebates to, or making discriminations among, its customers.

The answer then (R., pp. 35, 48) gives a history of Standard Oil Companies, as reflected in the decisions of this and other Federal courts and the reports of investigating committees, showing conclusively that said companies, including the Standard Oil Company of Louisiana, have virtually monopolized not only the production of gasoline, but its marketing in the several states and areas which have been par-

celed out among them and their subsidiaries—the State of Tennessee having been allotted to the Standard Oil Company of Louisiana, successor to the Standard Oil Company of Kentucky.

The extent of the business of the Standard Oil Company of Louisiana and the companies dealing in gas confederated with it is set out in the answer as follows:

> "And now, defendants show and aver that the plaintiff herein, and other like companies engaged in the business of refining and marketing gasoline, and having a practical monopoly of the sale of gasoline in the State of Tennessee, have, by their representations as to its widespread useful qualities, particularly for power and motor purposes, so induced the people of Tennessee to the uses of gasoline, particularly for motor and power purposes, that said commodity, by said plaintiff and others allied with it, and dealing therein, has been and is devoted to the public use, and has become and is affected with a public interest, and is subject to reasonable regulations in its use and price by the State of Tennessee.
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> "Defendants charge that the plaintiff herein, and others, refiners and dealers in combination with it, in the manner and by the practices set forth in Exhibit No. 3 hereto, fixed the price and attempted to control, and do control, directly or indirectly, the price of every gallon of gasoline sold in the State of Tennessee.
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> "That gasoline has become of such general use as to affect directly or indirectly practically all of the people of Tennessee, is shown by the fact that the sales of gasoline in Tennessee in 1924 amounted to 90,798,244—that such sales were increased in 1925 to 110,411,294 gallons, and in 1926 to 129,358,213 gallons—thus showing an increase over 1924 of, in round numbers, thirty-nine million gallons of gasoline.
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> "In the State of Tennessee there are in use more than two hundred and eighty thousand motor vehicles, consisting of automobiles, trucks, motorcycles, taxicabs, and busses, to the operation of which gasoline is an

absolute necessity; and in addition to such motor-driven vehicles, there are thousands of farm tractors, stationary gasoline engines, road-making machinery and other kinds of machinery to which the use of gasoline has become necessary and indispensable.

"In said state, the use of gasoline has become, and is necessary, not only to the operation of motor-driven vehicles used in trade and commerce, but to automobiles used by business concerns, and by families for their health, comfort, and convenience.

"By the use of gasoline, bus companies and other common carriers have become important factors in the daily commerce of the state. In practically every county of the state bus lines are used, and these are rapidly taking the place of railroads in local public transportation.

"The General Assembly of the State of Tennessee is now considering legislation upon the subject of bus companies as common carriers. Without the use of gasoline, trade and commerce carried on and operated through the agency of bus companies, automobiles, trucks, and other motor-driven vehicles depend upon the opportunity and ability of the public to secure gasoline at reasonable prices.

"During the year of 1926, the State of Tennessee built and constructed 484 miles of public highway, and now has under contract and under contemplation of construction, additional 1,237 miles of highway. It is necessary in the building, operation, and maintenance of its highways for the state to use, and the state does use, large quantities of gasoline, and the building and maintenance of said highways at reasonable cost and expense depends upon the ability and opportunity of the state to secure gasoline at reasonable prices.

"In practically all of the municipalities of the state maintaining and operating fire departments, the use of gasoline has become and is indispensable for the proper operation of engines and other machinery connected with said departments and devoted to the use and protection of the public.

"In nearly all of the ninety-five counties of the State of Tennessee, the rural schoolhouses serve widespread areas, and experience has shown that many of the children in such areas have been unable to attend the public schools, particularly during the winter months, for lack of means of transportation, with the result that at this time, in more than half of the counties of Tennessee, motor-driven vehicles, operated by gasoline, are being used to carry and transport to such schoolhouses the children of Tennessee in order that they may receive the benefits of at least a primary education.

"Without the use of gasoline for such motor-driven vehicles—which use has been induced by plaintiff and other gasoline refiners and dealers—the school busses and trucks cannot be operated, and the result to the school children of Tennessee would be hurtful beyond calculation if the state fails to secure gasoline at reasonable and fair prices for said busses and trucks. Further, not only is the use of gasoline necessary to commerce and trade within the State of Tennessee, but in its use for private and family automobiles, it contributes largely to the promotion, not only of the convenience and comfort, but of the health of the people of Tennessee, and for such purposes it is essential that gasoline be secured at a fair and reasonable price.

"It carries the bread winners of the family to their work and returns them to the home with the least possible waste of time, and then in the evening and on holidays carries the tired mother and the children to the pure and health-giving air of the country.

"From such uses as have been hereinbefore referred to, and others of which the Court will take cognizance, it is manifest that gasoline and the opportunity to secure the same at reasonable prices have become necessary in practically every department of human activity, having to do, or connected with, the development of the resources of the state with the proper exercise of governmental functions in the building and maintenance of roads and the furnishing of means of reaching and making accessible the public schools of the state—with

intra-state travel and commerce, and with the comfort, health, welfare, and prosperity of the people of the State of Tennessee, with the result that gasoline has become affected with a public interest, and has, in fact, been devoted to the public use, so that its regulation is not only proper, but has become imperative under conditions existing in the State of Tennessee, as hereinbefore set out.

"There is no attempt made by the Act challenged by the plaintiff to take from it any legitimate right. Defendants deny that plaintiff has a constitutional right to destroy competition by granting rebates, or to sell its products at extortionate prices, and these are the things condemned and sought to be prevented by said Act passed under the sovereign police powers of the state."

AMENDMENT TO BILL.

After appellants had filed their answer and motion to dismiss, which brought to the attention of the District Court the utter failure of the Standard Oil Company of Louisiana to aver that its business was about to be interfered with or that procedings were about to be instituted against it by state officials for violating the provisions of said Act, the appellee, on June 6, 1927, filed a motion to be permitted to amend its bill so as to charge that the officers of the State of Tennessee would cause it to be indicted for each and every violation of said Act, and said motion was granted and the original bill so amended.

R., pp. 117, 119, 120.

AMENDMENT TO ANSWER.

Thereupon the officials of the State of Tennessee were permitted to amend their answer so as to specially answer said amendment to said original bill, as follows:

"Defendants in special answer to the amendment to the original bill say:

"The defendants, Frank S. Hall, Commissioner of Finance and Taxation, and L. D. Smith, Attorney General of Tennessee, are by said Act charged with the

duty of enforcing the same in the manner therein prescribed; and if the plaintiff has been advised that these officers of Tennessee, charged with the enforcement of the Act of 1927 challenged in the bill, intend to enforce the Act, these defendants say that the plaintiff has been properly and correctly advised; but if the plaintiff has been informed or advised that it will be indicted for each and every violation by it of said Act, defendants say that such advice or information is wholly erroneous and without any basis in fact, because defendants have no such intention or purpose, and said allegation is denied.

"Further answering, defendants say it is their opinion, and they so aver, that said Act in its Eighth Section provides and prescribes the only penalty which can be enforced against the plaintiff for violation of said Act, to-wit: a refusal to grant the plaintiff a permit, or the cancellation of the permit already granted, and that such penalty so provided in said Act for its enforcement is exclusive.

"Further, defendants say, however, that if the plaintiff should be guilty of such unlawful acts as bring it in conflict with the Anti-Trust Act of Tennessee of 1903, Chapter 140, plaintiff is not even then subject to indictment, but to the Ouster Penalty provided by said Anti-Trust Act, being the Act of 1903, Chapter 140.

"Further, defendants deny that they have any intention or purpose to undertake to enforce said Act of 1927 in any other manner than is prescribed in said Act, and its validity is determined."

R., pp. 118, 122.

OPINION OF COURT.

After its answer had been amended, and also after the answer of appellants had been amended, as hereinbefore shown, the application of plaintiff for injunction came on for hearing before three judges in the District Court, upon the entire record, to-wit: the original bill as amended and exhibits thereto, and the motion of defendants to dismiss and their answer, with exhibits thereto, and their answer

to the amendment to the original bill. And thereupon, on August 20, 1927, the opinion of the Court was filed, holding in substance:

(1) That because of the threatened prosecutions alleged in the amendment to the bill, plaintiff was entitled to an injunction. The Court overlooked or ignored the amendment to the answer specially answering the amendment to the original bill, sworn to by the Attorney General of Tennessee, in effect denying the allegations contained in the amendment to the original bill and denying that defendants had any intention or purpose to enforce said Act in any other manner than as prescribed in said Act (which does not provide for indictment), and until said Act was construed by the courts and its validity determined.

(2) That the price-fixing provisions of the Act of 1927 were in violation of the due process clause to the Fourteenth Amendment to the Federal Constitution.

(3) That, notwithstanding the provisions of Section 12 of the Act—"that if any section or provision of this Act shall be held to be invalid, this shall not affect the validity of other sections or provisions hereof" (R., p. 23)—the price-fixing provision constituted the main purpose of the Act, and that, as it seemed to the District Court, "it is inconceivable that except for that purpose the legislation would have been enacted," and therefore the entire Act was void.

R., pp. 123-128.

A decree was entered in accordance with the opinion of the Court.

R., pp. 129, 130.

After the entry of said decree, F. S. Hall, one of the original defendants, sued as Commissioner of Finance and Taxation of the State of Tennessee, resigned said office and was succeeded by Albert S. Williams; and thereupon, by agreement, plaintiff's bill was dismissed as to the said F. S. Hall, and said Albert S. Williams, as Commissioner of Finance and Taxation of the State of Tennessee, was substituted as one of the defendants to the original bill in the room and stead of the said F. S. Hall.

APPEAL.

Thereupon, defendants in the court below petitioned for and were granted an appeal to this Court.

ASSIGNMENT OF ERRORS.

The assignments of error submitted and filed with the petition for appeal is found in the Record at pages 134 and 135, and is as follows:

"I.

"That the Court was in error in holding the Act of the General Assembly of Tennessee, challenged and complained of in this cause, to be unconstitutional, because said Act is a valid and proper exercise of the police power of the state in its declared purpose of preventing monopoly and extortion and protecting intra-state commerce and transportation.

"II.

"That the Act of the General Assembly of Tennessee complained of and held by the Court to be in violation of the Fourteenth Amendment to the Federal Constitution is a proper and valid regulation of the gasoline industry affected with the public interest, and which industry is a proper subject of state regulation.

"III.

"That it is within the just and reserved powers of the State of Tennessee to regulate and fix reasonable prices for the sale and distribution within the state of gasoline—a commodity the sale and distribution of which affects, directly and indirectly, all the people of Tennessee.

"IV.

"The opinion and holding of the Court to the effect that the entire Act was unconstitutional was erroneous even if the price-fixing provisions of the Act were beyond the power of the state.

"It was and is the obvious purpose of the General Assembly to exercise all the power the state had or has in regulating the gasoline industry and remedy the evils recited in the Act, and even if that part of the Act relating to fixing prices should be held invalid, the other provisions of the Act separate and distinct therefrom should be sustained and enforced. The Court was therefore in error in failing to sustain all the provisions of the Act except the price-fixing provision, even assuming that to be invalid.

"V.

"The Court was in error in issuing the injunction, because the plaintiff had a plain, adequate, and complete remedy at law."

PROPOSITIONS OF LAW.

I.

The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said state, and is not lawfully entitled to carry on its said business therein or to complain of the Act of 1927.

Upon the facts hereinbefore set out (p. 9-12), showing that both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana are owned and controlled by the Standard Oil Company of New Jersey, and further showing the manner and circumstances under which the Louisiana corporation was organized and came to do business in Tennessee, the Court will look through the veil or shell of the corporate organization of the latter company to ascertain the real controlling interests for which said Louisiana corporation is acting and for which it was brought into Tennessee, and, having so found, hold that said Louisiana corporation represents the same interests controlling the Kentucky corporation, ousted from the State of Tennessee, and that it is subject to the judgment of ouster

and the injunction prohibiting it from doing business in Tennessee, hereinbefore referred to.

Moriwetz on Private Corporations, Sec. 227;
Cook on Corporations, 6 Ed., Sec. 709;
McGaskill vs. U. S., 216 U. S., 515;
People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33;
State Ex Rel Watson vs. Standard Oil Co., 49 Ohio, 137, 15 L. R. A., 156;
Towles & Co. vs. Miles, 131 Tenn., 79;
Dillard and Coffin Co. vs. Richmond Oil Co. 140 Tenn., 298;
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941;
Beal vs. Chase, 31 Mich., 490.

II.

A foreign corporation is not entitled to carry on its business in any state except by complying with the conditions prescribed by such state.

Crescent Oil Co. vs. Miss., 257 U. S., 129;
Yeiser vs. Dysart, 267 U. S., 538;
Hall vs. Geiger, 242 U. S., 539;
Caldwell vs. Sioux Co., 242 U. S., 558;
Merrick vs. Halsey, 242 U. S., 569.

In the Crescent Oil Company case, *supra*, this Court, among other things, said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. *Horn Silver Mining Co. v. New York,* 143 U. S., 305; *Baltic Mining Co. v. Massachusetts,* 231 U. S., 68, 83, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a

classification making restrictions applicable to corporations only. *Hammond Packing Co. v. Arkansas*, 212 U. S., 322, 343, 344; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83. And see *Fort Smith Lumber Co. v. Arkansas*, 251 U. S., 532; *American Sugar Refining Co. v. Louisiana*, 179 U. S., 89; *Williams v. Fears*, 179 U. S., 270, 276; *W. W. Cargill Co. v. Minnesota*, 180 U. S., 452.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils."

257 U. S., 137.

In the case of Yeiser vs. Dysart, *supra*, this Court held that inasmuch as lawyers practice their profession by virtue of licenses from a state, the state has the right to regulate their charges.

If the State of Tennessee has the right to say to the Standard Oil Company, You shall not do business in this state, has it not the right to say, You may do business in this state only when you are willing to sell gasoline at reasonable and fair prices?

In the Hall, Caldwell, and Merrick cases, *supra*, this Court sustained the Blue Sky Laws of Ohio, South Dakota, and Michigan; and in each of these laws the dealer and owner of securities, stocks, bonds, etc., were prohibited from putting same on the market until they had obtained permits to do business; and we submit that the requirements in reference to the applications for business permits were very similar to those in the Tennessee Act now under consideration.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business and good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and

sell the securities in question at all unless and until it was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these acts were sustained as a proper exercise of the police power for the protection of the public.

The proposition above stated and the cases supporting same are particularly applicable to the Fourth Assignment of Error. (*Supra*, p. 19.)

III.

Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases.

Schollenberger vs. Penn., 171 U. S., 1;
Austin vs. State, 110 Tenn., 563, 566;
United States vs. Teschmaker, 22 Howard, 392;
Knight vs. U. S. Land Association, 142 U. S., 161;
Jameson vs. Ind. Natural Gas Co., 127 Ind., 555;
Sparrow vs. Strong, 3 Wallace, 97, 104;
Muller vs. Oregon, 208 U. S., 412.

In the Schollenberger case, *supra*, it was in effect held that no particular proof is required of those facts which by human observation and experience have become generally known to be true.

In the Austin case, *supra*, it was held that it was not essential that the facts and circumstances should have been recorded in written history or science to entitle courts to take judicial notice of them.

In the Jameson case, *supra*, it was held that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipe lines.

In Sparrow vs. Strong, 3 Wall, 97, 104, this Court took cognizance of the tremendous growth of the mining interests; therefore, why should it not take cognizance of the unparalleled growth of the marketing or sales of gasoline in Tennessee, and the further fact that this commodity enters into close touch with, and is essential to, nearly every human activity in Tennessee?

In Muller vs. Oregon, 208 U. S., 412 (52 L. Ed.), 551, 555, Mr. Louis D. Brandeis, now Mr. Justice Brandeis, appeared for the State of Oregon and incorporated in his brief numerous authorities for documents, resolutions, and legislation bearing upon the question involved as to whether the State of Oregon had the right to regulate the hours of labor, and it is manifest that these were considered by this Court, it being, among other things, said:

> "We take judicial cognizance of all matters of general knowledge."

IV.

Every presumption and reasonable intendment is in favor of the constitutionality of the Act.

The above proposition is elementary when the validity of an Act of the Legislature, passed with due form and ceremony, is under consideration; but it is not improper to call to the attention of the Court the following cases—Federal and State:

In *Brown vs. Maryland,* 12 Wheat, 436, wherein a statute of Maryland was challenged for repugnance to the commerce clause of the Federal Constitution, Chief Justice Marshall said:

> "It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."

In the Sinking Fund cases, 99 U. S., 718, Chief Justice Waite, among other things, said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Arizona Copper Company vs. Hammer*, 250 U. S., 400 (63 L. Ed. 1058), the Arizona Employer Liability Act was under consideration, and it was insisted that said Act violated the Fourteenth Amendment to the Federal Constitution; and it was, in substance, held that those challenging such legislation designed to promote the general welfare have the burden to show that the effect thereof is unreasonable and arbitrary and has no substantial relation to the end desired before such legislation can be brought within the inhibition of said amendment.

In dealing with the validity of the state's statute the Court will not destroy it except upon the clearest grounds. This rule was applied by this Court in *Knoxville vs. Knoxville Water Company*, 212 U. S., p. 8. In that case there had been findings of fact by a Master and confirmed by the Court upon which it was held that certain water rates were unreasonable, and therefore unlawful. In considering this phase of the case, the Court, speaking through Mr. Justice Moody, said:

> "We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of the suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an Act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character; and this is true, whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature and must be regarded as an exercise of the legislative power. *Prentis vs. Southern R. Co.*, 211 U. S., 210 ante, 67, 29 Sup. Ct. Rep., 67; *Honolulu Rapid Transit & Land Co. vs. Hawaii*, 211 U. S., 282 ante, 55, 29 Sup. Ct. Rep., 55."

In the case of Atkins vs. Children's Hospital, 261 U. S., 525, 544, this Court said:

> "This Court, by an unbroken line of decisions, from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond a rational doubt."

See also:

Middleton vs. Texas Power, etc., Co., 249 U. S., 152;
Mt. Timber Co. vs. Washington, 243 U. S., 219;
Green vs. Frazier, 253 U. S., 233;
Manufacturing Co. vs. Falls, 90 Tenn., 466;
State Ex Rel vs. Brewing Co., 104 Tenn., 715, 740;
Railroad vs. Byrne, 119 Tenn., 278, 291, 292.

V.

Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the state.

Munn vs. Ill., 94 U. S., 113-154;
Allnutt vs. Englis, 12 East., 527, 539, 542;
Brass vs. North Dakota, 153 U. S., 391;
Budd vs. New York, 143 U. S., 517;
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389, 391, 410, 411, 415-417;
Stafford vs. Wallace, 258 U. S., 495;
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237-239;
Wolfe Pack. Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-541;
Oklahoma Operating Co. vs. Love, 252 U. S., 331;
Oklahoma Gin Co. vs. State, 252 U. S., 339;
Rail & River Co. vs. Yappel, 236 U. S., 338;
McLean vs. Arkansas, 211 U. S., 539;
Knoxville Iron Co. vs. Harbison, 183 U. S., 13;
Same case, 103 Tenn., 421;

Dayton Coal, Iron, etc., Co. vs. Barton, 183 U. S., 23;
Same case, 103 Tenn., 604;
Leeper vs. State, 103 Tenn., 500-531, 532.

ARGUMENT.

TO WHAT DOES THE POLICE POWER OF THE STATE EXTEND?
It has never been limited by express definition.

In Cooley on Constitutional Limitations, p. 707, it is said:

> "Police power in its broadest acceptation means the general power of a government to preserve and promote public welfare, even at the expense of private right."

In People vs. Budd, 117 N. Y., 1 (affirmed by this Court in 143 U. S., 517), it was, among other things, said:

> "All property, all business, every private interest may be affected by it and brought within its influence. Under it the Legislature regulates the use of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relation to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interest of society. It has limitations; it cannot be arbitrarily exercised to deprive the citizen of his liberty or his property. But a statute does not work such a deprivation in the constitutional sense sim-

ply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters in difference, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of terms employed by jurists and publicists in defining the power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity, as each case arises, to determined whether the particular statute falls within or outside of its appropriate limits."

It extends to the safety, health, morals, comfort, and welfare of the people and expands to meet new conditions.

Leeper vs. State, 103 Tenn., 532;
Knoxville Iron Co. vs. Harbison, *supra;*
Dayton Coal, Iron, etc., Co. vs. Barton, *supra;*
Knoxville vs. Knoxville Water Co., 107 Tenn., 686.

In Leeper vs. State, 103 Tenn., 500-531, *et seq.*, it was, among other things, said:

"What is the scope and meaning of the term 'police power' has never been defined. The Supreme Court of the United States has expressly declined to define its limits. Stone v. Miss., 101 U. S., 814.

"In Mayor of New York v. Miln, 11 Pet (U. S.), 139, it is said: 'It embraces every law which concerns the welfare of the whole people of the state, or of any individual within it and upon the persons and things within it.'

"In Hanibal R. R. Co. v. Husen, 95 U. S., 465, it is said: 'The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within

the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.'

"In Smith v. The State, 16 Pickle, 505, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete."

In In Re: Rahrer, 140 U. S., 554, the Supreme Court of the United States, speaking through Mr. Justice Fuller, said:

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

As above stated, this Court has not, by express definition, limited the extent and application of the police power of a state, and has laid down no hard and fast rule restricting its exercise to any given class of cases.

New circumstances and new conditions must be dealt with

as they arise, and frequently a business which, under ordinary circumstances, would be treated as purely private business, becomes through its increased importance to the public welfare, charged with a public interest.

As stated by the Court in *Wolff vs. Industrial Court*, 262 U. S., 522:

> "Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such peculiar relation to the public that this is superimposed upon them."

In the case of *German Alliance Insurance Co. vs. Lewis, supra*, this Court sustained an Act extending and applying the police of the state to the regulation of the business of fire insurance companies and fixing the prices to be charged.

In the case of *Rail & River Co. vs. Yaple, supra*, this Court said:

> "The objection that the law is unconstitutional as unduly abridging the *freedom of contract* is prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S., 539, 53 L. Ed., 315, 29 Sup. Ct. Rep., 206, in which the court sustained a law of the State of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the state, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing. *Schmidinger v. Chicago*, 226 U. S., 578; 57 L. D., 364; 33 Sup. Ct. Rep., 182; Ann Cas. 1914B, 284; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S., 549; 55 L. Ed., 328; 31 Sup. Ct. Rep., 259, and cases cited therein and reviewed."

These are but a few of the cases holding that the police power of the state expands to and controls all conditions, as they arise, affecting the safety, health, morals, comfort, and welfare of the people, and meeting new conditions as progress—yes, evolution, if you please—in business conditions, converts a former convenience or luxury into an absolute necessity. And this Court will be slow to review, if it does not hold that it cannot review, the economies and facts upon which the Legislature bases its conclusions that an existing evil should be remedied by an exercise of its police powers.

Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161.

The facts relied on showing that the gasoline industry is clothed with a public interest are not denied.

The facts are, as hereinbefore set forth (pp. 9-15), and as more fully disclosed in the answer of the appellants. R., pp. 27, 32, 35-54.

It is to be noted that neither in its bill as originally filed, nor by any amendment thereto, for which it had full opportunity, did the Standard Oil Company of Louisiana anticipate or attempt to deny the existence of the facts and conditions set forth in the answer, which caused the Governor of Tennessee to appeal to the Legislature for the relief of the public generally, and which resulted in the enactment of the legislation complained of.

Now, for the purpose of applying the principles controlling rate or price regulation to the evils complained of by the State of Tennessee, we ask the Court's indulgence while we re-state, briefly as may be, the practically undenied conditions sought to be changed and remedied by the General Assembly of Tennessee:

1. *Matters of common knowledge of which this Court can take cognizance.*

It is practically impossible, and deemed unnecessary, to set out all of such matters bearing upon the issues in this case; but, generally speaking, it is commonly known that the Standard Oil Companies, and other dealers or subsidiaries

to it, or confederated with it, endeavor to control and dominate the gasoline industry, to the injury of the public, by price-fixing and cutting to destroy competition, by rebates and discriminations in favor of retail dealers and customers in localities where a monopoly can be more easily secured by such practices.

These conditions are well described in an opinion of the Circuit Court of Appeals for the Second Circuit, in the case of *Mennen Company vs. Federal Trade Commission,* 288 Fed. Rep., 774, 778, 779, where, among other things, it is said:

> "It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the report of the Judiciary Committee of the House of Representatives, from which we quote as follows:
>
> " 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also some smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. . . .
>
> " 'The necessity for legislation to prevent unfair dis-

criminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce —notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influence—to lower prices of their commodities oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . .

" 'In seeking to enact section into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.' "

2. *The history of the petroleum industry, as portrayed by the decisions of this Court,* and other courts of last resort, is referred to in the answer of appellants (R., pp. 27, 32, 35-50), is known to this Court, and is not denied by appellee.

Standard Oil Co. vs. State of Tenn., 117 Tenn., 618;
State vs. Standard Oil Co., 120 Tenn., 86;
Standard Oil Co. vs. U. S., 211 U. S., 1;
Standard Oil Co. vs. State, 217 U. S., 817;
Standard Oil Co. vs. Mo., 224 U. S., 761;
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86;
Standard Oil Co. vs. State, 107 Miss., 227;
State vs. Standard Oil Co., 15 L. R. A., 145; 49 Ohio State, 137;
State vs. Standard Oil Co., 218 Mo., 1.

These cases disclose the unrelenting and unswerving determination on the part of the Standard group, the dominant factor in the petroleum industry, to monopolize and control

the entire industry, and this purpose has continued from the original organization of the Standard Oil Trust until the present day.

The methods employed, as set out in the opinion of Chief Justice White in *Standard Oil Co. of New Jersey vs. United States*, 221 U. S., 1, were to destroy competition by rebating, price-cutting, discriminatory practices, and the division of marketing territory among the various Standard groups.

The learned Chief Justice said in his opinion that from the facts establishing this purpose and intent it was "*so certain as practically to cause the subject not to be within the domain of reasonable contention.*"

The holding and opinion of the learned and lamented former Chief Justice of this court in the case just referred to is so illuminating of conditions existing then and continuing to exist to the present day, that we deemed it proper to refer thereto in the answer of appellants (R., pp. 38, 47), and to aver that such conditions continued to exist in these United States and in the State of Tennessee.

3. *Dealers in gasoline in Tennessee have, in fact, a monopoly of that business.*

The facts in general terms in respect to the widespread and enormous use of gasoline in Tennessee in practically every department of human activity and concern are, as hereinbefore set forth (*supra*, pp. 12-15) and stated in appellant's answer.

R., pp. 52, 53.

It is shown that in the year 1926 there were sold and used in Tennessee 129,358,213 gallons of gasoline—an increase in sales and use of more than 39,000,000 gallons over that sold and used in the year 1924.

The appellee, and other dealers in gasoline, and their representatives, have done all in their power to devote gasoline to the public use by sedulous, widespread, continuous, informative propaganda as to its useful qualities in the home, in business, and in every department of life, and thereby have induced the people of Tennessee to purchase the enormous amount of gasoline hereinbefore referred to,

and to so apply it to practically all departments of life that it has become an absolute necessity—which can be procured only from gasoline dealers in Tennessee whose charges and prices are sought to be regulated by the Act in question, so that—and only to the extent that—the citizens may secure this necessity at a *reasonable* price and the dealer may secure a *reasonable* profit or return.

4. *Ouster from the state under the anti-trust Acts would not give relief to the people of Tennessee.*

Tennessee has an Act inhibiting combinations and agreements lessening and tending to lessen full and free competition in the sale of commodities in Tennessee, which was sustained and enforced by the Supreme Court of that state and by this Court in the case (120 Tenn., 86; 217 U. S., 817) above referred to.

But while the appellee and other dealers in Tennessee, as shown upon this record, have been guilty of the unlawful practices denounced by said anti-trust Act, nevertheless it is manifest that to oust them from Tennessee would not afford relief.

This is shown by what happened when the Standard Oil Company of Kentucky was ousted by this Court, affirming the decree of the Supreme Court of Tennessee.

If these companies now doing business in Tennessee and guilty of practices denounced by said anti-trust Act were ousted from the state, it is practically sure that, in respect of the appellee, its place would be taken by another company of the Standard Oil group, and the place of other corporations would be taken by other companies—all claiming the right to sell this article of necessity—this article monopolized by them—at any price fixed by them, and by any means and methods, though denounced by the laws of Tennessee, used and invoked by them to control and dominate the gas industry of Tennessee to the hurt and injury of her people.

It is respectfully insisted that every measure or remedy hitherto intended to regulate this industry falls far short of relief to the people of Tennessee, and that such relief can only be applied effectively through this price-fixing statute

which guarantees to the dealer a reasonable price for his gasoline—and which, in effect, so far as legislation may avail, guarantees to the dealer a reasonable and fair price for his gasoline.

In this connection permit us to call to the attention of the Court a part of a report of a Senate Investigating Committee.

After more than fifty years of anti-trust legislation, Federal and State, and litigation thereunder attempting to curb the evils hereinbefore set out, the matter was investigated by the Manufacturers' Committee of the United States Senate in the winter of 1923; and in March of that year said committee, after having devoted several months to hearing testimony, and after having examined officials of the leading petroleum companies, made an exhaustive report to the Senate, and, in concluding said report, said:

> "It must be obvious from the facts set forth in this report that the business cannot go on as at present organized and conducted. It is essential to the life of the industry and vital to the public also that neither the public nor the small independent producers and refiners shall be left as at present at the mercy of a combination which advances or decreases prices as it pleases. Unless some means can be found to prevent the manipulation of prices by the large companies, and particularly the Standard group, it is as certain as a future event can be that gasoline prices in the near future will be so advanced as to put gasoline beyond the reach of the public generally as a motor fuel. Great as the capital invested in the business has become, important as the business is to thousands who are engaged in it, and to other thousands who receive dividends from it, *there is still more important interest to be reckoned with, and that is the interest of the public. Petroleum and its products have become an absolute necessity. The business is clothed with a great public interest. The gas plants, electric light plants, railroads, and street cars are no longer greater universal necessities than petroleum and its products.*"

The legislation challenged by the appellee Oil Company, and the other oil industries in Tennessee, is sustained by the decisions of this court as a valid exercise of the state's police power.

The cases referred to and relied upon for the proposition just stated are those cited under our fifth proposition of law, *supra* (p. 26), and others which have received full consideration by this Court in its opinions delivered within recent years; and it is not deemed necessary to discuss and analyze all of them, and we will confine our discussion to some of them hereafter to be noted.

We are not unmindful of the recent decisions of this Court relied upon by appellee, and particularly the cases of *Tyson vs. Banton,* 264 U. S., 140; *Fairmont Creamery Co. vs. Minnesota,* 274 U. S., 1; and *Ribnik vs. McBride,* decided on May 28, 1928.

These cases are clearly distinguishable in their facts from the case at bar.

The distinction between a place of amusement or selling of theater tickets (Tyson vs. Banton, *supra*) and a commodity of such universal use—a commodity absolutely essential to modern conditions—as gasoline, is too obvious for discussion.

In the *Creamery case,* as we understand it, this Court treated the question submitted to it as being, in substance, whether the Creamery company had the right to enter into a fair and "normal contract, long regarded not only essential to the freedom of trade in commerce, but also beneficial to competitors." That is not this case, nor anything akin to it.

The Act now in question before your Honors is intended to provide a fair and reasonable price to the dealer and to prevent the destruction of competition, the use of rebates and discriminations between customers, long denounced by both Federal and State statutes.

In the *Ribnik case* the Court merely held that the business of an employment agent is not so affected with a public interest as to enable the state to fix charges to be made by said agent.

So it is respectfully submitted the facts of this and the cases above referred to are clearly distinguishable from the undisputed facts shown in this record which brought about the passage of the Act to relieve against the evils to the public therein referred to.

THE MUNN, ALLNUT, AND WOLFF CASES.

The principles announced and enforced in these cases sustain the Act complained of upon two grounds:

(1) The gasoline industry in Tennessee has been carried on, and is being carried on, in such a manner as makes it of utmost public consequence affecting the community.

(2) Dealers in gasoline, though without a grant or governmental franchise, have a virtual monopoly of the sale and distribution of gasoline in Tennessee.

The undisputed facts above referred to sustain both propositions and bring this case directly within the principle announced in the three cases above referred to.

The Munn case is the guidepost—the chart.

In the Munn case (94 U. S.), this Court, speaking through Chief Justice Waite, said:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to being controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."
>
> R., p. 126.

And again:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin,

that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

R., p. 133.

Further, in the Munn case, it is recognized that a monopoly, though not built upon a governmental grant or franchise, justifies regulation of rates and prices.

This Court followed some of the early English cases dealing with this particular question—among others, the case of *Allnut vs. Inglis*, 12 East, 527.

In that case it is held that the right of a state to regulate charges applies not only to monopolies arising out of a grant from the sovereign, *but also to conditions where there is in fact a monopoly.*

In discussing this question, Lord Ellenborough, C. J., among other things, said:

"The question then is, whether, circumstanced as this company is, by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the Port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he

is confined to take reasonable compensation only for the use of the wharf."

And further on:

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject." (Italics are ours.)

The Allnut case was approved by this Court in the Munn case, and, to us it seems, entered largely into the result reached by the Court.

In the *Wolff* case this Court had under consideration a Kansas statute involving the right of a state, through an Industrial Commission, to practically take charge of a Packing Company, fix rates of labor, compel a continuance of business, etc.; and in determining the validity of said statute, this Court, among other things, said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament of Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards,* 86 Mo., 102; *Terminal Taxicab Co. v. District of Columbia,* 241 U. S., 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 84 U. S., 113; *Spring Valley Water Works v. Schettler*, 110 U. S., 347; *Budd v. New York*, 117 N. Y., 1, 27; s. c. 143 U. S., 517; *Brass v. Stoeser*, 153 U. S., 391; *Noble State Bank v. Haskell*, 219 U. S., 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389; *Van Dyke v. Geary*, 244 U. S., 39, 47; *Block v. Hirsh*, 256 U. S., 135."

262 U. S., pp. 535, 536.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of

such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

262 U. S., p. 539.

And on page 540 quoted the following from the Munn case:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.*"

It is insisted that the undisputed facts of this case, hereinbefore referred to, bring this case squarely within the third classification above set out.

Whatever may have been the nature of the gasoline industry in its beginning, certainly it has come to be of such public consequence as subjects itself to governmental regulation.

"Public consequence" not only by reason and character of business and the manner in which it is carried on, but because said business as carried on in Tennessee, is a virtual monopoly requiring regulation for the protection of the public.

In the case of *Van Dyke vs. Geary*, 244 U. S., 39, this Court sustained an Act of the State of Arizona under which a water system, owned by private individuals, was regulated by the Utilities Commission and its prices thereby fixed, notwithstanding the fact that the owners had none of the franchise rights or privileges referred to in Chief Justice Taft's first classification. The Court placed the case

in the third classification under the authority of the Munn case and sustained the price-fixing Act because—quoting from the Munn case:

> "Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large."

VI.

If the price-fixing features of this Act are invalid, nevertheless the other regulatory features are valid, and should be sustained, as insisted in the Fourth Assignment of Error. (R. 134, 135.)

OPINION OF DISTRICT COURT.

On this subject the lower court held:

> "It is further argued for the state that even though it be held that the Act is invalid in so far as it attempts to confer upon the state the power to fix the prices at which gasoline shall be bought and sold, the purposes of the Act are so varied and separable that it may and should be upheld in other particulars. If it may be said that with the price-fixing features of the Act stricken therefrom the legislation would have been enacted, the entire Act should not be declared invalid. The Act itself provides 'that if any section or provision of this Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof.' There are thirteen sections in the Act, the first of which is in the form of a preamble referred to, the next nine deal in the main with the subject of regulating and fixing the prices of gasoline, Section 11 defines the term gasoline, Section 12 provides, as we have just stated, that if any section of the Act shall be held invalid it shall not affect the other sections or provisions thereof, and Section 13 provides only for the effective date of the Act. *Notwithstanding the legislative declaration, it seems clear to us that the main*

purpose of the Act is to regulate and fix the prices at which gasoline shall be bought and sold, and it is inconceivable that except for that purpose the legislation would have been enacted." (R., p. 128.) (Italics are ours.)

ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR. (R., pp. 134, 135.)

We respectfully challenge the correctness of the conclusion and holding of the learned District Court. On the contrary, we submit that the Legislature of Tennessee intended to exert *all its sovereign* power in regulating this industry and prohibiting all the evils in the trade it had the power to prohibit.

Price-fixing was but *one* of the remedies. The obvious desire of the Legislature was to invoke *every possible remedy*. This is shown by the message of the Governor to the Legislature and by the preamble in the first section of the Act. (R., p. 16.) The regulatory features of this Act, aside from the price-fixing features, are aimed at the evils in the trade described by the Governor in his message, and shown to have existed for many years by the judicial history of the business and the plaintiff in this cause.

SEVERABLE PROVISIONS OF THE ACT ANALYZED.

The following provisions of the Act are clearly valid:

Provision requiring permits and the collection of data.

Section 1 provides for the establishment of a division of motors and motor fuel, which should be in charge of a superintendent to be appointed as other superintendents of divisions of the Department of Finance and Taxation. (R., p. 16.)

Section 2 provides that it shall be the duty of this superintendent to make investigations, collect data concerning the manufacture and sale of gasoline, the manner of carrying on the trade and business, the methods employed by dealers. This data was for the purpose of (a) aiding and fixing prices, and (b) that it "should be available for the inspec-

tion and information of the public, and said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder." (R., pp. 16, 17.)

In view of the evils sought to be remedied, it is clear that the provision for the collection of this data and the publication of same would be a valuable aid in suppressing the evils complained of.

The State of Tennessee had an anti-trust Act passed in 1903, the first section of which provides:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations made with a *view to lessen*, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture and sale of articles of domestic growth or of domestic raw material, and all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations *designed*, or which tend to *advance, reduce or control the price* or the cost to the producer or consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

This Court has sustained the validity of this Act in its application to the unfair practices of the Standard Oil Company.

Standard Oil Co. vs. State, 217 U. S., 817.

This Act was amended by the Legislature in 1927, at the same session and just prior to the passage of the Act in controversy, the first section of which amendment is as follows:

> "Be it enacted by the General Assembly of the State of Tennessee, that Section 1, of Chapter 140, Acts of

Tennessee, 1903, page 268 thereof, known as the Anti-Trust Act, be amended as follows:

"That any arrangement, contracts and agreements that may be made by such corporation or person, by and between its agents and sub-agents, to sell and market its products and articles, manufactured in the state, or imported into this state, to any producer or consumer, *at prices reduced below the cost of production* or importation into this state, including the cost of marketing and a *reasonable and just marginal profit to cover wages or management and necessary incidentals, as is observed in the usual course of general business,* and contiuues such practice under such agreements, contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or make any other arrangements, contracts or agreements, by and between its agents and sub-agents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purpose, are hereby declared to be against public policy, unlawful and void."

Ch. 60, p. 201 of Acts of 1927.

It is quite clear that the data the superintendent is required by *Section 2* to ascertain and publish will be of great assistance to the officials of the state in enforcing the Anti-Trust Act, and this "pitiless publicity" of evil practices would prevent in some measure at least some of the evils complained of.

The case of Weller vs. New York, 268 U. S., 319, 322, and the case of Tyson vs. Banton, *supra,* involved the same statute of the State of New York. The main purpose of that Act was to fix the price of theater tickets and prevent the resale of tickets at any higher price, and it was made unlawful to do so without a license.

The Act appears in Sections 167 to 174 of the General Business Laws of the State of New York.

Section 168 provides that all those dealing in the resale

of theater tickets should secure a license; such license should be granted upon the written application setting forth such information as the Comptroller might require.

Section 169 provides that the applicant should file with his application a bond conditioned that the applicant will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket in excess of the price authorized by this article. This section further provides that a suit to recover on the bond might be brought by the Comptroller or on the relation of any party aggrieved.

Section 170 provides that if any licensee should be guilty of any fraud or misrepresentation, or shall charge for any ticket a price in excess of that authorized by the article, the Comptroller is authorized to revoke his license.

Section 171 authorizes the investigation of the business methods of such licensee.

Section 172 provides that no license shall issue to sell any ticket to a theater or other place of amusement at a price in excess of fifty cents in advance of the price printed on the face of the ticket.

Section 173 provides that any person violating the provisions of the Act by failing to procure a license and file the required bond shall be guilty of a misdemeanor.

Section 174 provides that any part of the Act declared invalid shall not affect the validity of the remaining provisions.

The defendant was indicted for a failure to apply for and obtain the license required by the Act. On the trial it was insisted that the price-fixing provisions of the Act were invalid.

The Court of Appeals of New York sustained a conviction. In affirming this conviction, the Supreme Court of the United States said:

> "In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to re-sale prices were invalid.
>
> "Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which un-

dertake to establish re-sale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the state to require such license is clear, and that we need not determine the validity of the price restrictions.

"It is not and, we think, it cannot seriously be argued that the state lacked power to require license of those engaging in the business of re-selling theater tickets.

"The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state, we shall hold this provision severable and valid. *Brozee v. Michigan*, 241 U. S., 240. The statute itself declares (174): 'In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity of the remaining provisions of the article.' If 172, which restricts re-sale prices, were eliminated, a workable plan would remain. See *Dorch v. Kansas*, 264 U. S., 286. The judgment of the court below is affirmed."

268 U. S., pp. 324, 325.

It will be noticed that in the case of *Tyson vs. Banton* the plaintiff complied with the valid provisions of the Act. The Court, in speaking of the Tyson Company, said:

> "It is duly licensed under Section 168, Ch. 590, New York Laws, 1922, and has given a bond under Section 169 of that chapter in the penal sum of $1,000.00 with sureties, conditioned, among other things, *that it will not be guilty of any fraud or extortion.* (See Weller v. New York, 268 U. S., 319, 322."

Certainly the New York Act was no more severable than the Act we are dealing with.

The principal object of the New York Act was to limit the prices to be charged by the ticket dealers. The appli-

cation provided for in Section 168 of the Act must be accompanied by the bond provided for in Section 169.

It is obvious that after the elimination of the provisions held in the Tyson case to be invalid, only a part of the requirements as to the provisions of the bond in Section 169 are necessary to be complied with.

It is clear that the bond filed by Tyson only contained a part of the provisions of 169, as Mr. Justice Sutherland recites that the bond was conditioned, among other things, "that it will not be guilty of any fraud or extortion."

Treating the price-fixing provisions of the Act as invalid, necessarily eliminates that part of Section 169 with reference to the provision of the bond that recites: . . . "will not exact or receive a price for any such ticket or evidence of the right of entry, in excess of the price authorized by this Act."

Nor could a suit be brought to recover for a charge made in excess of this price, as provided in this bond.

In like manner that part of Section 170 providing for the revocation of licenses when a price in excess of that fixed has been charged must be eliminated. With this exception, the balance of the section is of course sustained.

In other words, in that case the Court not only eliminates sections, but parts of sections and parts of sentences in order to save a part of the Act.

In the instant case there is much more reason for sustaining the preliminary provisions of this Act in view of the history of the gasoline industry and the attempts of the state to regulate it.

In the case of *State vs. Howitt*, 107 Kansas, 423 (later affirmed by this Court), the Court sustained part of the Industrial Relations Act, although the main features of that Act were held unconstitutional in the Wolffe case, 262 U. S., 522.

The Court said:

> "It is quite clear that the part of the Act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference

to the effect of partial invalidity. However, one section of it reads as follows:

" 'If any section or provision of this Act shall be found invalid by any court, it shall be conclusively presumed that this Act would have been passed by the Legislature without such invalid section or provision, and the Act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.' (Laws 1920, Special Session, Ch. 29, Sec. 28.)

"The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the Legislature desired the unobjectionable part to become a law irrespective of the validity of the remaining. *Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent,* and requires the court to give all portions of the statute that do not in themselves violate some constitutional provisions. (The State v. Wilson, 101 Kansas, 789, 806; 159 Pac., 679.)

"No reasons are suggested, and none occur to us, why the Legislature may not authorize the court of industrial relations to conduct an inquiry into conditions existing in the mining fields, and in furtherance of that inquiry, require the attendance of witnesses."

See also Sallee v. Dalton, 213 S. W., 762;
Richardson v. Young, 122 Tenn., 471, 522-524;
Shea v. Mining Company, 55 Mont., 522;
State v. Trewitt, 113 Tenn., 561, 572.

In the cases of *Hall v. Geiger,* 242 U. S., 538; *Caldwell v. Sioux Falls Co.,* 242 U. S., 558; and *Merrick v. Halsey,* 242 U. S., 568, this Court sustained the Blue Sky Laws of the States of Ohio, South Dakota, and Michigan.

In each of these Acts the dealers in and owners of secu-

rities, stocks, bonds, etc., were prohibited from putting same on the market until they obtained a permit to do business. The requirements with reference to the application for the permits in these cases were very similar to those in the Act we are considering.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business, and the good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until he was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these Acts were sustained as a proper exercise of the police power for the protection of the public.

Section 3 of the Tennessee Act makes it unlawful for any person, firm, or corporation to engage in the intra-state sale of gasoline without having obtained permit as provided in Section 2. Obviously this section is valid. (R., p. 17.)

Section 4 (R., pp. 17, 18) provides that every person, firm, or corporation desiring to engage in intra-state commerce in gasoline in this state shall make application to the Superintendent of the Division of Motors and Motor Fuels for permit, and in this application he must set out the following information:

> "(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business, the number and location of the different places at which he intends to operate; and if a retail business, the number and location of the different service stations and pumps he intends to operate.
>
> "(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm, and the place or places at which it is intended to do business; if a domestic corporation, the location of its

principal office and the names and addresses of its principal officers; if a foreign corporation, the state of its incorporation, its principal place of business in the state where chartered, and its principal place of business in this state, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this state.

"(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

"(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline.

"(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

"(f) Such other information as may be prescribed by the Superintendent."

The propriety and importance of requiring this information is too obvious for discussion, in view of the history of the gasoline industry and the evils sought to be remedied. This information is absolutely essential if the provisions against rebating hereinafter to be referred to are valid, and in any event this information is of very great value to the officials of the state in enforcing the Anti-Trust Act.

Sections 5 and 6 (R., pp. 18-20) give the Commissioner the power to decline a permit to the dealer if the prices fixed by him are deemed improper, and the power to fix the price is given to the Commissioner of Finance and Taxation. If the price-fixing provisions of the Act are unconstitutional, all of Sections 5 and 6 are invalid except the preliminary provision for the issuance of the permit. Section 7 would in like manner be inoperative.

The provisions prohibiting rebating and discrimination are valid.

That part of *Section 8* (R., p. 21) which reads as follows violates no provision:

"Be it further enacted, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The right to sell one's property at any price he chooses, as we have seen, is not an absolute right. A denial of this unlimited right is at the foundation of all the anti-trust Acts. That price cutting and rebating has been one of the most potent weapons used by companies dealing in petroleum products for the destruction of competition and monopolizing the trade is undeniable. Chief Justice White especially emphasized this fact in the *Standard Oil case*, 221 U. S., p. 1. It was for this offense that the Standard Oil Company was ousted from Tennessee, 120 Tenn., 86. It was for this the Standard Oil Company of Indiana was ousted from *Missouri*, 224 U. S., 761. This was the basis for injunction in the case of *Nash v. United States*, 259 U. S., 273, and in *State v. Standard Oil Company*, 173 Federal, 177.

If rebating, price cutting, and discrimination may be prohibited by injunction, why may they not be prohibited by legislation? This question is put at rest by the decision of this Court in the case of *Central Lumber Company v. South Dakota*, 226 U. S., 157. In that case an Act of the Legislature prohibiting discrimination in prices between different sections or communities, and which prohibited the selling of any commodity at a lower price in one section or one community than in another section or community, after equalizing the distance, was attacked, because it was insisted that it violated the Fourteenth Amendment to the Constitution of the United States.

It was insisted that the Act was:

> "Intended for the protection of only a particular class—regularly established dealers; and because it unreasonably limits the rights of the people to make such bargains as they like."

It was also insisted that:

> "All competition . . . imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place."

To which the Court responded:

> "The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the Legislature shares the now prevailing belief as to what is public policy, *and find that a particular instrument of trade war is being used against that policy in certain cases*, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

And again:

> "We must assume that the Legislature of South Dakota considered that the people selling in two places

made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economies or their facts. That the law embodies a widespread conviction appears from the decisions in other states. State v. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287, 130 Am. St. Rep., 671, 117 N. W., 768; State ex rel. Young v. Standard Oil Co., 111 Minn., 85, 126 N. W., 527; State v. Fairmount Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821, 133 N. W., 895; State v. Bridgman & R. Co., 117 Minn., 186, 134 N. W. 496."

And again:

"But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods. Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this Court that we simply refer to Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567, 568; 55 L. Ed., 328, 338, 339; 31 Sup. Ct. Rep., 259, and the cases there cited to illustrate how much power is left in the states. See also Grenada Lumber Co. v. Mississippi, 217 U. S., 433, 442; 54 L. Ed., 826, 831; 30 Sup. Ct. Rep., 535;

Lemeiux v. Young, 211 U. S., 489, 496; 53 L. Ed., 295, 300; 29 Sup. Ct. Rep., 174; Otis v. Parker, 187 U. S., 606, 609; 47 L. Ed., 323, 327; 23 Sup. Ct. Rep., 168."

The Courts in the state cases cited above sustain Acts to prohibit discrimination and rebating as the proper method of preventing destruction of competition.

It will be noticed that counsel made the same argument in the Central Lumber case, *supra*, that is being made in the case at bar—to-wit, that the Act was passed for the benefit of the small dealer and that it tended to destroy competition, instead of preserving it.

Adversary counsel rely on the case of *Fairmount Creamery Company v. State of Minnesota*, 274 U. S., 1-11. In that case, however, there was no condition of the trade sought to be regulated that required any such legislation as that involved. On the contrary, this Court held that the Legislature directly interfered with the method of doing business which was wholly unobjectionable *with reference to that particular trade.*

The Court referred with approval to several of the cases we have herein cited, especially *Purity Extract Co. v. Lynch, infra*, and *Merrick v. Halsey, supra.*

After referring to these cases, the Court said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without *substantial relation to some evil within the power of the state to suppress* and a clear infringement of private rights."

With reference to the specific Act and the facts with relation to the industry to be controlled, the Court says:

> "The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way *heretofore regarded as both moral and ben-*

eficial to the public and not shown now to be accompanied by evil results as ordinary incidents?"

In the case at bar, however, the judicial history of this industry and the Standard Oil Company's connection with the industry for more than half a century shows an actual, continuous, present, and unrelenting purpose on the part of the Standard Oil Company and other large companies engaged in the industry to destroy competition and monopolize the trade by the very trade practice condemned in Section 8 of this Act.

The report of the United States Senate Committee, already referred to—the numerous decisions of this Court and of the Supreme Court of Tennessee—the recent litigation in the State of Tennessee, hereinbefore referred to—the Governor's message to the Legislature and the preamble to this Act, all establish the fact of the evil complained of and the necessity of such legislation as that provided in this section of the Act.

We have hereinbefore set out the report of the Congressional Committee recommending the passage of the Clayton Anti-Trust Act, the second section of which provides as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price *between different purchasers of commodities,* which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect* of such discrimination may be to substantially lessen competition."

The committee's report shows that the evil practice of the Standard Oil Company in rebating and in discriminating in its prices was one of the things that made necessary this Federal legislation.

In other words, in the Fairmount Creamery case, the Act bore no reasonable relation to any actual evil existing in the

trade sought to be regulated; whereas the Act we are now dealing with bears a very essential relation to a long recognized evil that both the State and Federal governments have been attempting to regulate and control.

In the case of *Crescent Cotton Oil Company v. Mississippi*, 257 U. S., 129, this Court sustained the validity of an Act of the General Assembly of Mississippi prohibiting manufacturers of cotton seed oil or cotton seed meal from doing certain lines of local business, and especially from owning and operating cotton gins in the State of Mississippi. This Act was attacked by a manufacturer of cotton seed oil that owned and operated two cotton gins. It made the same insistence as that made here: that it was the owner of private property and that it had the right to own and use that property under the protection of the Fourteenth Amendment to the Constitution. It was insisted that it was impractical to purchase its cotton seed from other ginners or brokers, and that it was necessary to own its own gin in the proper operation of its business.

The Court said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn Silver Min. Co. v. New York, 143 U. S., 305; 36 L. Ed., 164; 4 Inter. Com. Rep., 57; 12 Sup. Ct. Rep., 402; Baltic Min. Co. v. Massachusetts, 231 U. S., 68, 83; 53 L. Ed., 127, 133; 34 Sup. Ct. Rep., 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain any classification making restrictions applicable to corporations only. Hammon Packing Co. v. Arkansas, 212 U. S., 322, 343, 344; 53 L. Ed., 530, 541, 542; 29 Sup. Ct. Rep., 370; Baltic Min. Co. v. Massachusetts, *supra*.

And see Ft. Smith Lumber Co. v. Arkansas, 251 U. S., 532, 533; 64 L. Ed., 396, 398; 40 Sup. Ct. Rep., 304; American Sugar Ref. Co. v. Louisiana, 179 U. S., 89; 45 L. Ed., 102; 21 Sup. Ct. Rep., 128; W. W. Cargill Co. v. Minnesota, 180 U. S., 452; 45 L. Ed., 619; 21 Sup. Ct. Rep., 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the law clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61; 55 L. Ed., 369; 31 Sup. Ct. Rep., 357; Ann. Cas., 1912C, 160, and cases cited; Rast v. Van Denman & L. Co., 240 U. S., 342; 60 L. Ed., 679; L. R. A., 1917A, 421; 36 Sup. Ct. Rep., 370; Ann. Cas., 1917B, 455."

In the case of Purity Extract Co. v. Lynch, 226 U. S., 197, the Court held an Act of the State of Mississippi valid, prohibiting the sale of non-intoxicating soft drinks. It could not be denied that the owner of these soft drinks had the right under the Constitution to own and sell this property. The state, on the other hand, in the exercise of its police power, had the right to prohibit and prevent the sale of intoxicating liquors. The General Assembly of the state in its wisdom concluded that the sale of certain non-intoxicating liquors could be used as a subterfuge to prevent the full operation of the prohibition against the sale of intoxicating liquors, and therefore, in order to aid in the enforcement of its prohibition against the liquor traffic, it sought also to prevent the sale of the harmless beverages

referred to, and the Court sustained this as a proper exercise of police power, and, among other things, said:

> "It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S., 425; 46 L. Ed., 623; 22 Sup. Ct. Rep., 425; Otis v. Parker, 187 U. S., 606; 47 L. Ed., 323; 23 Sup. Ct. Rep., 168; Ah Sin v. Wittman, 198 U. S., 500, 504; 49 L. Ed., 1142, 1144; 24 Sup. Ct. Rep., 756; New York, ex rel., Silz v. Hesterberg, 211 U. S., 31; 53 L. Ed., 75; 29 Sup. Ct. Rep., 10; Murphy v. California, 225 U. S., 623; 56 L. Ed., 1229; 32 Sup. Ct. Rep., 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment had no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

And so in the case at bar. The General Assembly trying this Act, seeks to remedy the evils and dangers threatening the gasoline industry of this state, and in order to prevent the destruction of competition has prohibited (a) rebating and price cutting and (b) discrimination between purchasers in different sections of the state.

THE PROVISION WITH REFERENCE TO DIFFERENTIALS.

The following provision of Section 8 is valid:

> "And provided further, that dealers shall maintain proper differentials between wholesale and retail prices." (R., p. 18.)

This, it will be observed, follows immediately the provision in Section 8 against rebating and discrimination.

This is not a price-fixing provision.

As far as this provision is concerned, the dealer is perfectly free to fix any price he may desire. He may not, however, make his retail and wholesale prices the same.

One of the methods in use by the Standard Oil Company and other large dealers in Tennessee to destroy small competitors was the practice of selling without any differential between retail and wholesale prices. (R., p. 18.)

It is simply another form of price cutting used by these dealers in order to destroy competition.

This is shown not only by the condition of the trade in Tennessee, as hereinbefore set out, but by the opinions of this Court in numerous cases dealing with the conduct of this trade and the various Standard Oil Companies. It is also shown by the report of the Senate Committee and by the Congressional Committee with reference to the Clayton Anti-Trust Act.

Section 9 provides that the Attorney General of the state, or an assistant to be designated by him, shall assist in the enforcement of the Act and shall represent the company in all proceedings with reference thereto. (R., p. 22.)

Section 10 provides for a small annual tax on the dealers securing permits under the provision of the Act. (R., p. 22.)

Section 11 clearly defines the term "gasoline" within the meaning of the Act. (R., pp. 22, 23.)

Section 12 provides, as hereinbefore stated, that if any section or provision of the Act shall be held invalid, this

shall not affect the validity of other sections or provisions thereof. (R., p. 23.)

The foregoing severable provisions of the Act are valid and, without regard to the price-fixing provisions, should be sustained.

IN CONCLUSION.

Therefore, for the reasons stated, it is respectfully submitted:

1. That the Act of the General Assembly of the State of Tennessee, challenged and complained of in this cause, is a valid, proper, and constitutional exercise of the police power of the state, designed and intended to regulate, within the state, the gasoline industry affected with the public interest, and to prevent monopoly and extortion in the sale and distribution, within said state, of a commodity devoted to the public use, and affecting, directly and indirectly, all the people of Tennessee.

2. That even if the price-fixing provisions of said Act should be held to be invalid, nevertheless other severable and distinct provisions of said Act should be sustained and enforced, particularly the provisions relating (a) to the publication of prices by gasoline dealers and filing same with the Department of Finance and Taxation; (b) the issuance of permits to gasoline dealers; (c) prohibiting rebates; (d) prohibiting discrimination; (e) for the collection and publication of data by the Finance Commission with reference to prices and conditions in the industry; (f) providing pen-

alties for violation of the several provisions of the Act thus designated; and (g) providing for judicial review of the orders of the Commission.

Respectfully submitted,

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APPENDIX.

CHAPTER 22 OF THE ACTS OF 1927.

SENATE BILL NO. 282.

(By McKnight, Wiggs and Miller.)

AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discriminati on; to create and establish a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of the Act; to levy and to collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels.

SEC. 1. Whereas, Gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State, and

Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation,

It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use,

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That there is hereby established a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, which said Division shall be in charge of a Superintendent to be

named and appointed as other Superintendents of Divisions of the Department of Finance and Taxation are provided by law.

SEC. 2. *Be it further enacted,* That it shall be the duty of the Commissioner of Finance and Taxation to require the Division of Motors and Motor Fuels, through the Superintendent and other employees of said Division, to make investigations and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to the dealers in Tennessee and elsewhere, freight rates, differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; the methods employed by manufacturers and dealers in the distribution of gasoline to consumers, and such other data and information as will or might be material in ascertaining and determining what prices would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers. All such data and information shall be available for use to the Commissioner and the Division aforesaid in the regulation of prices at which gasoline may be sold in the State of Tennessee, and shall be available for the inspection and information of the public, and the said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder. It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State at prices fixed and determined as hereinafter provided, and to perform such other duties as may be prescribed by subsequent sections of this Act.

SEC. 3. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, without first having obtained a permit to do such business, signed by the Superintendent of the Division of Motors and Motor Fuels and approved by the Commissioner of Finance and Taxation, and no per-

mit shall be issued to any firm, person, or corporation to engage in the sale of gasoline in intra-state commerce unless and until such dealer shall make application therefor in accordance with the regulations of this Act, and in compliance with all the requirements and provisions hereof.

SEC. 4. *Be it further enacted,* That every person, firm, or corporation, desiring to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:

(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business the number and location of the different places at which he intends to operate; and if a retail business the number and location of the different service stations and pumps he intends to operate.

(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm and the place or places at which it is intended to do business; if a domestic corporation the location of its principal office and the names and addresses of its principal officers; if a foreign corporation the State of its incorporation, its principal place of business in the State where chartered, and its principal place of business in this State, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this State.

(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution and such other costs and expense as may enter into the price at which it is proposed to sell such gasoline.

(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

(f) Such other information as may be prescribed by the Superintendent.

SEC. 5. *Be it further enacted,* That it shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to take into consideration all the information furnished as provided by the previous section, and if the price or prices at which said applicant proposes to sell gasoline does not exceed a reasonable profit to the dealer, after figuring the cost to the dealer, freight and expenses in marketing, and making a proper differential between the wholesale and retail prices, and the same is in the interest of the public, to issue to said applicant a permit authorizing him to sell gasoline in the State of Tennessee; provided, however, said permit must first be approved by the Commissioner of Finance and Taxation.

If, however, the price at which any applicant proposes to sell gasoline in Tennessee shall be by such Superintendent of Motors and Motor Fuels deemed unfair and unreasonable in view of the information, which by the previous sections is required to be taken into consideration, then it shall be his duty to fix and name a price or prices at which gasoline may be sold by the said applicant, and to notify said applicant thereof in writing stating the reasons for his action in this respect. In the event the applicant is dissatisfied with the action of the Superintendent it shall be his duty, before engaging in the sale of gasoline in this State, to notify the Commissioner of Finance and Taxation in writing, within ten days after receiving notice of the action of the Superintendent, of his dissatisfaction, and shall in said notice set forth specifically the objections which he has to the ruling of the Superintendent and the reasons upon which he relies for a review or correction of the action of the Superintendent, and shall demand of the Commissioner that he fix a time and place at which the Commissioner will hear proof, limited to the grounds and reasons assigned by the applicant for his dissatisfaction to the action of the Superintendent. Thereupon it shall be the duty of the Commissioner to fix a time and place and afford to the applicant an opportunity to be heard with respect to the grounds of his complaint by the introduction of proof, if desired. The time and place of such hearing will be named by the Commissioner, which shall not be more than

five days from the date of the filing of the complaint with him, notice of such time and place to be given to the applicant. It shall likewise be the duty of the Commissioner to give to the Governor and to the Attorney-General of the State, and to all other applicants for permits to whom permits have not been issued at the time, notice of the complaint of any applicant, and the time and place at which such said complaint will be heard. Any other person interested in the price of gasoline, either as a dealer or consumer, may likewise be heard upon the complaint of any applicant under such rules and regulations as the Commissioner may prescribe, provided, that said Commissioner may give notice by publication in daily newspapers published in at least two of the four larger cities of the State. After such hearing the Commissioner shall decide, upon taking into consideration the facts and information hereinbefore referred to, and such other facts as may be relevant, whether or not a permit will be issued to the applicant to sell gasoline at the price or prices, proposed, or if not at what price a permit will be issued, giving notice to the applicant thereof.

Any applicant aggrieved by the action of the Commissioner may file a petition for the purpose of having said action reviewed in any Chancery Court or Circuit Court of Davidson County, Tennessee, provided notice of his intention to file a petition for review has been served on the Commissioner five days in advance of filing. Upon receiving notice of the intention of an applicant to file a petition for review, as aforesaid, it shall then be the duty of the Commissioner to cause all of the proceedings had before him on the application to be reduced in writing, and verified by him as being correct, so that when such petition has been filed and notice thereof served upon him, (and the petitioner shall cause such notice to be served) the Commissioner shall, within five days, then file with the Clerk of the Court where said suit is brought a transcript of all the proceedings had before him, and which is sought to be reviewed, and said transcript duly verified shall constitute all the record, and shall be the basis of the action of the Court of Review; provided, that the court may, in its discretion, upon

good cause shown, allow either side to file additional proof. No order of the Commissioner shall be superseded by said Court before final hearing, unless after five days' notice to the Commissioner it shall appear to the Court at a regular hearing, or at Chambers upon proper motion, that irreparable injury will result to the petitioner on the continuance of said order, and that no irreparable injury will result from a dissolution or modification thereof; in such event the Court may, in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper.

SEC. 6. *Be it further enacted*, That it shall be unlawful for any person, firm or corporation, engaged in selling gasoline in Tennessee, at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation. Any dealer desiring to change his price shall file his application with the Commissioner at least five days before the proposed change in prices, and shall set out in his said application the reasons for said change, and shall show:

(a) That conditions exist, or have arisen justifying such changes and what such conditions are, which show that the new price to be charged is not unfair to the public and not unfair to other dealers.

In determining whether such change shall be permitted the same procedure shall be had as hereinbefore prescribed with respect to the issuance of the original permit, and the same remedies shall apply to any one aggrieved at the action of the Commissioner as is afforded to one aggrieved by the action of the Commissioner upon an original application, including the right of review to any Chancery or Circuit Court of Davidson County, Tennessee.

SEC. 7. *Be it further enacted*, That either the Attorney-General of the State, or any other person interested, whether as dealer or consumer, may file with the Superintendent of the Division of Motors and Motor Fuels objection to any price or prices being maintained by any dealer as herein defined, and may show in his petition setting up said ob-

jection that the price or prices are extortionate or unfair to the public, or to any other dealer, as above set out, and after due notice to such dealer, and after hearing proof in the manner and form hereinbefore prescribed for the procedure of the Commissioner of Finance and Taxation, and in such manner as will give both sides proper opportunity to be heard, the Commissioner shall, if the facts warrant such action, issue an order to the said dealer whose prices are complained of restraining him from selling at the price complained of, or the Commissioner may make in said order any such conditions or limitations as under the facts will do justice to said dealer and protect the public and legitimate competition, the Commissioner at all times taking into consideration those facts and elements hereinbefore set forth as constituting a fair and reasonable price in the interest of the public. Any other person aggrieved at the action of the Commissioner in this respect shall be entitled to the same right of objection and review by the Courts, and under the same procedure as is hereinbefore provided in the case of original applications for permits.

SEC. 8. *Be it further enacted*, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further, that dealers shall maintain proper differentials between wholesale and retail prices as such differen-

tials may be fixed and determined by the Superintendent of the Division of Motors and Motor Fuels with the approval of the Commissioner of Finance and Taxation. And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable, or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about such unreasonable and unfair increase in such refinery price.

No firm, person or corporation who violates any of the provisions of this Section shall be entitled to a permit to engage in the wholesale or retail or intra-state sale of gasoline. The Governor, the Attorney-General of the State, or any person interested in the price of gasoline, whether dealer or consumer, may upon petition file with the Commissioner of Finance and Taxation complaint against any person, firm or corporation as being guilty of a violation of the provisions of this Section, and if such complaint be filed with the Commissioner, properly sworn to and verified, it shall be the duty of the Commissioner to give notice to the dealer whose conduct is complained of and afford a hearing upon notice to all persons concerned. If the dealer complained of is found to be guilty of the charges by the Commissioner, then it shall be his duty to refuse to issue or cancel his permit. Any investigation had by the Commissioner under the provisions of this Section shall be held and conducted in the same manner as hereinbefore provided for complaints at the action of the Commissioner upon original applications, and the same remedies shall be afforded to those aggrieved as are hereinbefore afforded to persons aggrieved by the action of the Commissioner with respect to original applications for permits.

SEC. 9. *Be it further enacted,* That the Attorney-General of the State, or some assistant Attorney-General designated by him for said duty, shall be the law officer of the Division of Motors and Motor Fuels and the Commissioner of Finance and Taxation and shall represent the public in all proceedings before the said Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

SEC. 10. *Be it further enacted,* That before any person, firm or corporation shall obtain a permit to deal in gasoline, either at wholesale or retail, in this State, he shall pay a special permit tax which shall accompany the application for permit as follows:

(a) For each place so conducted for the wholesale marketing of gasoline $10.00 per annum.

(b) For each retail station or curb pump $1.00 per annum.

This tax shall be in addition to all other license, inspection or ad valorem taxes otherwise provided by law, and shall be kept as a special maintenance fund to aid in defraying the expenses of the Motors and Motor Fuel Division of the Department of Finance and Taxation.

SEC. 11. *Be it further enacted,* That the term "gasoline" as used in this Act means and includes:

(a) The volatile substance produced from petroleum, natural gas, oil shale or coal heretofore sold under the name of gasoline.

(b) Any volatile substance or product less than 112 Fahrenheit Flash Test when tested in a manner approved by the U. S. Bureau of Mines derived wholly or in part from petroleum, natural gas, oil shale or coal.

(c) Benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

SEC. 12. *Be it further enacted,* That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof.

SEC. 13. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 5, 1927.

HENRY H. HORTON,
Speaker of the Senate.

SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved: April 8, 1927.

AUSTIN PEAY,
Governor.